RAILROADS—LIABILITY OF LICENSEE ROAD FOR INJURIES.—The defendant had a contract with the Southern Pacific Company, whereby its trains ran over the line of the latter. By the terms of the contract the trains of the defendant were subject, in their movements, to the orders of the train dispatcher of the Southern Pacific Ry. Co. The plaintiff, a conductor on the Southern Pacific, was injured in a rear end collision resulting from the negligence of the defendant's engineer in disregarding signals. *Held,* that the defendant was liable; that the defendant was not, by virtue of the contract, relieved of liability to third persons for injuries resulting from negligence of its own employees, which injuries were in no way attributable to any order of tne train dispatcher of the Southern Pacific. *Hamble* v. *Atchison, T. & S. F. Ry. Co.* (1908), — C. C. A. 9th Cir. —, 164 Fed. 410.

The question involved has been before the United States courts in two other instances, under a contract precisely similar to that in the principal case. In *Atwood* v. *C., R. I. & P. Ry.* (C. C.), 72 Fed. 447, it was held that, inasmuch as the licensee had subjected the movement of the trains to the dispatcher of the licensing road, it had no power to control the movement of its trains, that it had released control over its employees, and therefore could not be held on the doctrine of respondeat superior. The court in that case relied upon *Byrne* v. *K. C., Etc., R. R.,* 61 Fed. 605; *Donovan* v. *Downs Construction Syndicate* [1893], 1 Q B. 629, and *Smith* v. *St. Louis, Etc., R. R.,* 85 Mo. 418. In each of these cases, however, the whole charge of the employees had been released by the licensee and the engine controlled by employees of the licenser. Consequently the cases did not rest upon the same footing. In *Clark* v. *Greer,* 86 Fed. 447, 32 C. C. A. 295, the doctrine of *Atwood* v. *C., R. I. & P. Ry.,* supra, was disapproved. It was there held that the master cannot claim exemption from liability for damages occasioned by the negligent acts of its servants, merely because it empowered another to give orders to the servants with reference to the work. The latter view is adopted in the principal case, and seems to be based upon sound reasoning. The defendant's employees retained the actual physical control of the engine. The accident was not claimed to have been the result of any order of the train dispatcher and cannot be attributed to him. The Southern Pacific could not compel the exercise of care by the defendant's employees, and by no diligence on its part could it have averted the accident. The defendant was relieved of liability only in so far as damage may have resulted from the exercise of control by the licenser. The court in the principal case says: "To avoid liability, the original master must resign full control of the servant for the time being. It is not enough that he be partially under the control of another."

SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.—Defendant contracted to sell plaintiff a quantity of hay to be used by him to feed his cattle—about 2,000 head. Defendant refused to deliver, and plaintiff was unable to procure a sufficient amount of hay elsewhere to properly sustain the cattle. *Held,* that the measure of damages was the damage to the buyer from the want of hay, including the expenses in securing other hay, the

cost of taking some of the cattle to another place, and the loss of cattle from starvation and shrinkage for want of hay (STEELE, C.J., and GABBERT, J., dissenting). *Richner* v. *Plateau Live Stock Co.* (1908), — Col. —, 98 Pac. 178.

It is the general rule, as laid down by this decision, that where like property cannot be obtained in the open market, and the seller knows that the buyer made the purchase for a specific purpose, the seller is liable for any special damages to the buyer, in the absence of fraud, these being the natural consequences of non-delivery and presumably contemplated by the parties. *Hammer* v. *Schoenfelder,* 47 Wis. 455; *Border City, I. & Co.* v. *Adams,* 69 Ark. 219. This sounds something like the rule laid down in the familiar case of *Hadley* v. *Baxendale,* yet as pointed out in BENJAMIN, SALES, § 1308, in referring to that case "it is not universally true that the mere communication of the special circumstances of the case made by one party to the other would impose on the latter an obligation to indemnify the former for all the damages that would ordinarily follow from the breach." In the principal case evidence as to all the items of damages was put in by plaintiff over defendant's objection, yet it seems like a situation in which the limitation mentioned in Benjamin should apply. Certainly the shrinkage of the herd from lack of food seems rather a matter of conjecture. Still evidence on this point was introduced on the theory that it is enough if from approximate estimates of witnesses a specific conclusion can be reached, the exact amount need not be shown with absolute certainty. *Satchwell* v. *Williams,* 40 Conn. 371; *Hubbard Specialty Mfg. Co.* v. *Minn. Wood Designing Co.,* 47 Minn. 393; *Barngrover* v. *Maack,* 46 Mo. App. 407. Under this rule evidence upon almost any item of damage might be introduced, admitting the testimony of experts upon matters which to most minds would seem entirely conjectural, as in the principal case, the shrinkage of the herd.

SALES—PERFORMANCE OF CONTRACT—WAIVER OF DEFAULT.—Plaintiff contracted with defendant to furnish the hardware to be used in the erection of a public building by defendant. A certain percentage was to be paid on the goods as the work progressed, and the remainder within thirty days after completion of work. The sum of $25 per day was agreed upon as liquidated damages for delay. The third payment was made after the expiration of the thirty-day limit, but all the payments did not amount to the 85% agreed upon. *Held,* that the payments did not, as a matter of law, constitute a waiver of damages for delay (MCLAUGHLIN, J., dissenting). *Reading Hardware Co.* v. *Peirce* (1908), 113 N. Y. Supp. 331.

There can be no doubt about the soundness of the general rule as laid down in the prevailing opinion in this case. The rule is this: that payments made upon a contract and acceptance of the work do not prevent a party from setting up a counterclaim for failure to perform within the time specified in an action to recover the balance of the contract price. But under the facts in the principal case defendant's counterclaim would amount to more than what was still due on the contract, and thus the dissenting opinion holds to the view that the liquidated damages cannot be recovered;